As a matter of fact, moreover, the buyer fails to derive any appreciable benefit, and often, as in the principal case, suffers positive injury through unsuccessful attempts to utilize the article. It would therefore seem more just to hold that the buyer, who can discover the defect only on inspection after acceptance, should not by that acceptance forfeit his right to return the goods and be compelled to retain what must frequently prove to be an article useless for his purposes.

On strict legal theory, as well as on these practical grounds, the right of rescission should be granted. *Optenberg* v. *Skelton*, 85 N. W. Rep. 356 (Wis.). While the warranty in form is collateral, in its essence it is an important part of the contract and a material element of the consideration, for the failure of which the right of rescission should be allowed. It cannot properly be regarded therefore as waived by an acceptance, which is necessary for the purposes of inspection.

THE ADMISSIBILITY OF POST-TESTAMENTARY DECLARATIONS. — A recent decision by the United States Supreme Court is an important addition to the conflict as to when a testator's declarations will be admitted as evidence against the validity of an alleged will. A document was offered as a last will, and to show either forgery or revocation, the testator's unsworn declarations concerning the disposition of his property were offered by those who opposed its probate. The court held such evidence inadmissible unless made so near to the time of its execution as to be a part of the *res gesta*. *Throckmorton* v. *Holt*, 21 Sup. Ct. Rep. 474.

As far as the question of forgery is concerned the decision is in accord with the weight of authority. *Walton* v. *Kendrick*, 122 Mo. 504; *Gordon's Case*, 50 N. J. Eq. 397. In some jurisdictions, however, there is a tendency to admit such evidence under certain circumstances. For instance, in one state, it is admitted not as proof in itself of forgery, but as corroborative of other evidence. *Swope* v. *Donnelly*, 190 Pa. St. 417. In other states, it is admitted to show the state of feeling between the parties merely. *Johnson* v. *Brown*, 51 Texas, 65. These courts argue that this evidence, although dangerous, is often of great probative value and sometimes is the only evidence of the fraud. But this argument goes too far. These declarations come within the rule excluding hearsay, and our law of evidence begins only when we begin to exclude evidence which is logically relevant. The insuperable difficulty is that there is no recognized exception to the rule against hearsay which will cover the case.

With the question of revocation, however, there is more difficulty, as some late American decisions support the admissibility of such declarations for that purpose. *Lane* v. *Hill*, 68 N. H. 275; Steph. Dig. Ev., art. 29. These courts rely mainly upon a comparatively recent English case of very doubtful authority. *Sugden* v. *Lord St. Leonards*, L. R. 1 Pr. Div. 154. That case, which overruled earlier cases, has been looked upon with disfavor in its own jurisdiction. *Woodward* v. *Goulstone*, 11 App. Cases, 469. Moreover, at most, the case stands for this only, that such declarations may be used to corroborate other evidence as to the contents of a lost will. Granting its authority for that proposition, there is nothing to warrant the extension of that doctrine to cases similar to the principal case.

In one set of circumstances, however, a strong argument of admissi-

bility might be made. When an act of revocation is clearly proved, such declarations might be admitted to show the intent of revocation. It is the modern doctrine that where intent is material, contemporaneous declarations of intent are admissible. *Commonwealth* v. *Trefethen*, 157 Mass. 180. It might then be urged that at the time when they were made, the testator intended to dispose of his property in a manner inconsistent with the will. From this it might be possible to infer that when he did the act he had the requisite intent. To support this use, analogies might be drawn from the cases where a bankrupt's subsequent statements are used to show intent in an act of bankruptcy. *Rawson* v. *Haigh*, 9 J. B. Moore, 217. But it would require strong evidence to bridge over the time between the act and the declarations, and thus make the subsequent intent material. Even then it would be somewhat of a novel extension. But in the principal case, as there is no evidence that the testator did an act of revocation nor that his intent was continuous, the decision seems clearly right.

COVENANTS AGAINST INCUMBRANCES RUNNING WITH THE LAND. — The benefit of the old common law warranty ran to the heirs or subgrantees of the original feoffee. Holmes's Common Law, 375. When conveyances came to be made by force of the statute of uses, the common law warranty, applicable only to feoffments, became obsolete and covenants of right to convey, of seisin, and against incumbrances were introduced largely to take its place. Owing to the unfortunate wording of these covenants, a literal interpretation results in their being regarded as broken the moment they are given. By such a breach, they are prevented from running with the land for the benefit of heirs or remote grantees, and thus do not serve the purpose for which they were originally intended. In actions on the covenant against incumbrances it has been definitely decided that only nominal damages may be recovered until actual damages have been suffered. Therefore, provided an immediate breach is recognized, the disastrous result follows, that not only does the covenant against incumbrances fail to run for the benefit of grantees as in the case of the other covenants, but the Statute of Limitations may run against the claim before it is possible to recover more than nominal damages. As regards this covenant, therefore, the courts have made special efforts to obviate the foregoing consequences.

In England the courts adopted the doctrine that the breach of these covenants, although immediate, is continuing, and therefore its benefit runs with the land to subsequent holders. *Kingdon* v. *Nottle*, 4 M. & S. 53. However desirable the results, this reasoning is clearly indefensible. Discussion of its soundness has, however, been set at rest by a statute providing that all such covenants shall run with the land. In America it has been held in several jurisdictions that although the covenant is broken at once, thereby becoming a mere chose in action, yet this chose in action is impliedly assigned to all subsequent grantees. *Security Bank* v. *Holmes*, 68 N. W. 113 (Minn.); *contra*, *Kenny* v. *Norton*, 10 Heisk, 384 (Tenn.). The New York Court of Appeals, dealing with the question for the first time, has recently adopted this view in a strong dictum. *Geiszler* v. *De Graaf*, 59 N. E. Rep. 993 (N. Y.). Although this implication of assignment is not unreasonable, it is obvious that the desired results are thus only partially obtained. The Statute of Limita-